CONSTITUTIONAL LAW—COMMERCE CLAUSE—IN ENACTING THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT, WHOSE STATUTORY DAMAGES PROVISION SHOULD BE INTERPRETED ON A PER VIOLATION BASIS, CONGRESS ACTED WITHIN THE SCOPE OF ITS COMMERCE POWER AND DID NOT VIOLATE THE FIRST AMENDMENT—*United States v. Gregg*, 226 F.3d 253 (3d Cir. 2000).

Congress enacted the Freedom of Access to Clinic Entrances Act (FACE) in 1994 to combat violence directed at providers of reproductive health services. *United States v. Gregg*, 226 F.3d 253, 259 (3d Cir. 2000) (citing 18 U.S.C. § 248 (2000)). The statute provides for the criminal prosecution of protesters who use actual force, or the threat of force, to "injure, intimidate or interfere" with persons seeking access to reproductive health services. *Id.* at 257. The statute also confers standing on the U.S. Attorney General or any injured party to sue protesters for civil remedies. *Id.* at 258.

After a series of blockade protests at an abortion clinic in Englewood, New Jersey, the Newark office of the U.S. Attorney General filed a complaint in U.S. District Court, District of New Jersey on April 18, 1997, naming thirty abortion protesters as defendants under FACE's civil action provision. *Id.* at 256. The Attorney General's office sought injunctive relief and statutory damages that were available under the statute. The district court, after a preliminary evidentiary hearing, granted an injunction against the defendants' protest activities. On December 11, 1998, the district court entered a final order holding the defendants liable for violating FACE with their blockade protests and granting the Attorney General's summary judgment motion. However, the court adopted the defendants' interpretation of the statutory damages provision and assessed damages of five thousand dollars per violation jointly and severally among the defendants, not per defendant as the government had argued. The Attorney General appealed the district court's interpretation of the statutory damages provision. *Id.* at 257. Eight defendants filed a cross appeal contending that: (1) the Attorney General did not have the option to elect statutory damages and was limited to actual damages, (2) Congress did not have the power to enact FACE under its commerce power, and (3) FACE infringed the defendants' First Amendment free speech protections.

Circuit Judge Oakes, sitting by designation and writing for a two-member majority of the United States Court of Appeals for the Third

Circuit, held that FACE assigned damages per violation, with joint and several liability attaching to each violator. *Id.* at 260. The majority also held that Congress acted within its commerce power in enacting FACE, and that the statute did not regulate speech protected under the First Amendment. *Id.* at 262, 267.

Beginning its analysis, the court first turned to the proper interpretation of FACE's statutory damages provision. *Id.* at 257. The court looked to the canon of statutory interpretation that holds if a statute's plain meaning is apparent, resort to other modes of statutory construction is unnecessary. *Id.* The court described the plain meaning inquiry as two-pronged: First the court must consider the express language of the statute, and then, to discern Congress's intent, the court must look to the legislative history and climate at the time of the statute's enactment. *Id.* The court found the express language of the FACE statute to be unequivocal. *Id.* at 258. The court cited Congress's use of the term "per violation" in the statutory damages provision of § 248(c)(1)(B) and contrasted the use of the "per violation" language with the permissive civil penalty subsection of the statute, where Congress used the terminology "against each respondent." *Id.* Finding the "dichotomy of expression" to be persuasive, the court held that Congress clearly intended statutory damages to be assessed per violation, with joint and several liability attaching to each defendant who engaged in the violation. *Id.* (citing *United States v. Gregg*, 32 F. Supp. 2d 151, 160 (1998)).

The court likewise dismissed the Attorney General's argument that the use of the term "whoever" at the beginning of the statute conveyed Congress's intent to hold each defendant responsible for five thousand dollars in statutory damages. *Id.* at 259. The court again referred to the "per violation" language in the applicable provision, and found that its use clearly overcame any prior reference in the statute. *Id.*

The court bolstered its interpretative analysis with an examination of FACE's legislative history and climate at the time the statute was passed. *Id.* Judge Oakes cited extensive congressional findings that described a "campaign of violence" directed at clinics, which had resulted in numerous deaths, casualties, and arrests nationwide. *Id.* The court also noted evidence that federal law enforcement was needed to remedy the failings of state and local authorities on this issue. *Id.* From this history, the court summarized the purpose of FACE as two-fold: to provide a remedy to compensate persons and clinics that have been harmed, and also to serve as a deterrent to would-be protesters. *Id.*

The majority next rejected an argument by the Attorney General that Congress intended the court to levy statutory damages on an individual basis to serve the deterrent function. *Id* at 259-60. In finding the statute a

sufficient deterrent as interpreted, the court pointed to the other options for penalty within the statute, including punitive damages, criminal liability, and permissive civil penalties. *Id.* at 259 (citing 18 U.S.C. §§ 248(b) & (c) (2000)). Judge Oakes asserted that the statutory damages provision is a substitute for actual damages, thereby abrogating the difficulty in proving actual harm. *Id.* The majority propounded that the grant of statutory damages should not be based on how many violators participated in the violation, but on the violation itself, since an action for actual damages would only be able to recover on a per violation basis, not per defendant. *Id.*

Judge Oakes next considered the Attorney General's argument that a "per violation" interpretation of the statute would encourage defendants to act *en masse*. *Id.* at 260. The court found this argument unpersuasive, reasoning that because the statute contained a variety of remedies, a prospective violator could not know if he faced an even more serious penalty than statutory damages, such as criminal prosecution. *Id.* Judge Oakes observed that this uncertainty preserved the statute's deterrent value, even with joint and several liability for the five thousand-dollar statutory damages attached. *Id.*

Turning to the defendants' contention that the Attorney General could only pursue recovery for actual damages and not statutory damages, the court considered whether attorneys general were free to pursue the same statutory damages available to private plaintiffs. *Id.* The majority, looking to the express language of FACE, held that the Attorney General was free to pursue statutory damages as a matter of right since the statute gave attorneys general standing to sue for "compensatory damages." *Id.* (citing 18 U.S.C. § 248 (c)(2)(B) (2000)). Noting that a prior subsection had clearly defined compensatory damages as "actual and statutory damages," the court interpreted this definition, as well as the legislative history, as persuasive evidence of Congress's intent to allow attorneys general to choose statutory damages in lieu of actual damages. *Id.* at 260-61 (citing 18 U.S.C. § 248 (c)(1)(B) (2000)).

Judge Oakes next contemplated the defendants' claim that FACE was an unconstitutional exercise of Congress's commerce power under the Constitution. *Id.* at 261 (citing U.S. CONST. art. I, § 8, cl. 3). The court, observing that it would be one of the last federal courts of appeal to weigh in on this issue, noted that seven other circuit courts had upheld the statute's constitutionality under the Commerce Clause, as well as several instances in which the U.S. Supreme Court had denied *certiorari* of the issue. *Id.* (citations omitted). The court, noting that congressional action was due substantial deference by the court, held that FACE was a proper exercise under the Commerce Clause. *Id.*

Judge Oakes, beginning the constitutional analysis, identified the Supreme Court's recent opinions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 120 S. Ct. 1740 (2000), as the pertinent sources for Commerce Clause interpretative guidance. *Id.* at 261-62. Using a rational basis standard, the court asserted that FACE is "a proper exercise of Congress's power to regulate intrastate conduct that, in the aggregate, has a substantial effect on interstate commerce." *Id.* at 262. The court elaborated, citing *Morrison* as providing the proper framework for deciding whether a statute regulates an activity that has the necessary "substantial effect" on interstate commerce. *Id.* Circuit Judge Oakes described the four factors *Morrison* presented for the court's consideration as (1) whether the activity is economic or commercial in nature, (2) whether the statute includes a "jurisdictional element," (3) whether Congress has provided express findings in support of the regulation, and (4) whether there is a sufficient connection between interstate commerce and the regulated activity. *Id.* at 262-63 (citing *Morrison*, 120 S. Ct. at 1751).

Applying the *Morrison* factors to FACE, the court found that the statute satisfied the first factor. *Id.* at 262. The court provided several arguments as to how the provision of reproductive health services is an economic activity, involving a staff, customer base, and supplies, for example. *Id.* Illegal protests, the court noted, had caused millions of dollars of damage to providers and had prevented many care-seekers from receiving treatment, and thus had an effect on the commercial activity of the clinics when viewed in broad terms. *Id.* The court distinguished FACE from the Violence Against Women Act, the statute found unconstitutional in *Morrison*, holding that FACE regulates misconduct that has an economic effect. *Id.*

Continuing, the court turned to the second *Morrison* consideration, whether FACE contains a jurisdictional element. *Id.* at 263. Though FACE did not contain an explicit jurisdictional element, the court held that this shortcoming was not necessarily fatal. *Id.* (citing *United States v. Bird*, 124 F.3d 667, 672-82 (5th Cir. 1997)).

Judge Oakes, continuing to the third factor, found that Congress had sufficiently documented a need for the statute with extensive findings. *Id.* Finally, the court contemplated the fourth *Morrison* factor: whether Congress had a rational basis to conclude that the behavior FACE regulated had a substantial effect on interstate commerce. *Id.* Judge Oakes, in finding a substantial effect on commerce, cited the extensive findings of Congress that clinic violence and intimidation had the effect of preventing access to reproductive health services. *Id.* Specifically, the court noted that clinic violence contributed to a shortage of doctors, making it difficult

for many women to seek reproductive health services. *Id.* at 263-64. The majority opined that the market for abortion services was national in nature, since both patients and doctors were known to travel interstate in order to participate in the service, which also indicated that the clinics, like many other businesses, were part of the "stream" of interstate commerce. *Id.* at 264.

Judge Oakes, acknowledging another of Congress's findings, observed that the pattern of violence against clinics was part of a national movement, having a detrimental national effect on the availability of health care. *Id.* The court highlighted recent incidents of clinic violence, and the resultant negative effects on abortion service availability in communities where such violence had occurred. *Id.* The court held that this evidence, taken as a whole, established that Congress had a rational basis to find that clinic violence had a substantial and direct effect on interstate commerce. *Id.* at 264-66. The court pointed to the functionality test of *Jones v. United States*, 120 S. Ct. 1904 (2000), claiming that clinic protests were analogous to the arson of a commercial building, which the case had cited as an example of a sufficiently commerce-affecting activity. *Id.* at 266. Judge Oakes also likened the activity regulated by FACE to that in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), where the Court found that discrimination in local restaurants had an adverse effect on interstate commerce. *Id.* In light of these precedents, the court concluded that FACE was a "legitimate regulation of activity having a substantial effect on interstate commerce." *Id.* at 267.

The court next rejected the defendants' First Amendment claim, joining numerous other courts of appeals that have upheld FACE against freedom of expression challenges. *Id.* The court rebuffed the defendants' claim that FACE was an unconstitutional viewpoint-based speech restriction. *Id.* Judge Oakes propounded that the statute governed all persons equally, without regard to the motivation for their actions, and was thus not viewpoint-based at all. *Id.* The majority held that FACE governs conduct, not speech, and Congress did not seek to discriminate against the protestors' anti-abortion message. *Id.* Though acknowledging that the regulated activity might have "expressive components," Judge Oakes asserted that government regulation was still appropriate since the statute met the requirements of strict scrutiny, as well as satisfied the three-part test for conduct with an expressive component found in *United States v. O'Brien* 391 U.S. 367 (1968). *Id.* at 268. The court affirmed the district court's ruling, rejecting the defendant's claim that FACE violated the First Amendment. *Id.*

Judge Weis, in a dissenting opinion, argued that FACE did not survive constitutional scrutiny. *Id.* at 268 (Weis, J., dissenting). While

acknowledging that seven circuit courts had found FACE constitutional, Judge Weis noted that several of those decisions had come over the objections of dissenting judges who had argued FACE did not satisfy *Lopez*'s requirements. *Id.* Judge Weis also claimed that after *Morrison*, the Commerce Clause analysis of *Lopez* was necessarily strengthened, so the majority's narrow reading of the *Lopez* holding was inappropriate. *Id.* at 269 (Weis, J., dissenting). The dissent charged that under this strengthened analysis, FACE did not have a substantial impact on interstate commerce and should be held unconstitutional. *Id.* Judge Weis suggested that the majority ignored the significance of these two Supreme Court cases, which was that Congress had limited authority to federalize local crime statutes under the Commerce Clause. *Id.* at 269-70 (Weis, J., dissenting). Judge Weis analogized FACE to the statutes found unconstitutional in *Lopez* (Gun-Free School Zones Act) and *Morrison* (Violence Against Women Act [VAWA]), noting that all three statutes governed crimes typically regulated by the states, and each had an insufficient nexus with commercial activity. *Id.* at 270 (Weis, J., dissenting) (citing *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)).

The dissent then analyzed FACE using *Morrison*'s four factors for reviewing whether Congress is constitutionally permitted to regulate an activity having a substantial impact on interstate commerce. *Id.* at 270-71 (Weis, J., dissenting). In contrast to the majority, which found the factors satisfied, the dissent took issue with each of the four factors, finding that in enacting FACE Congress had overextended its authority to regulate interstate commerce. *Id.* Addressing the first factor, the dissent stressed that while abortion providers clearly provide a commercial service, the activities regulated by the statute, the protests, were not commercial in nature. *Id.* at 270 (Weis, J., dissenting). While acknowledging that clinic violence does have some economic impact, the dissent emphasized that the court must examine the conduct FACE regulates and focus on its police power character, not any incidental economic effects. *Id.* Judge Weis propounded that not every activity with an economic impact is a commercial activity. *Id.*. Judge Weis distinguished *Heart of Atlanta Motel* from the present case, noting that the civil rights laws at issue regulated economic entities themselves, not the possible commercial conduct of third parties. *Id.* at 270-71 (Weis, J., dissenting).

Turning to *Morrison*'s second factor, the dissent argued that the lack of a jurisdictional element was a fatal flaw that could not be overcome by any amount of congressional findings. *Id.* at 271 (Weis, J., dissenting). Judge Weis declared that a jurisdictional element was needed to ensure that the government could only invoke the statute with proof that interstate commerce was indeed being affected. *Id.* The dissent maintained that this

lack of jurisdictional element creates a statute that is too broad in scope, unconstitutionally allowing federal intervention into purely local matters. *Id.*

Analyzing the third factor, Judge Weis criticized the majority's reliance on legislative findings, arguing that *Morrison* held that deference to congressional findings could not take the place of a judicial inquiry into whether the effect on interstate commerce was substantial. *Id.* at 272 (Weis, J., dissenting). The dissent also found the findings themselves suspect, arguing that the alleged economic effects were not proximate enough to be correctly attributed to clinic violence. *Id.*

Finally, the dissent discussed *Morrison*'s fourth factor of whether there was a sufficient link between the regulated activity and interstate commerce, and concluded that any supposed link between clinic protests and commerce was too attenuated. *Id.* at 272-73 (Weis, J., dissenting). The dissent reasoned that the economic activities cited by the majority—the purchase of supplies and operation of a business, for example—were not enough to transform the regulated activity from a local concern into a national problem. *Id.* The dissent also chastised the majority for finding state treatment of the problem inadequate, and concluded by lambasting Congress for federalizing local criminal law outside the limits of the Commerce Clause. *Id.* at 273-74 (Weis, J., dissenting). Judge Weis concluded by noting that in addition to being unconstitutional under the Commerce Clause, FACE should also be held unconstitutional under the Fourteenth Amendment, since there is no requisite state action. *Id.* at 275 (Weis, J., dissenting).

The court's interpretative analysis of the statutory damages question correctly weighed congressional intent as part of a plain meaning inquiry, and achieved an equitable result for plaintiffs and defendants: ensuring a remedy, but not one beyond what the legislature had in mind. In disposing of the constitutional challenge, the court has acted unsurprisingly in aligning itself with seven other circuit courts in finding FACE a constitutional exercise of Congress's commerce power. However, the court has undervalued a significant constitutional development that occurred after those cases were decided: the Supreme Court's opinion in *United States v. Morrison*. The majority echoes Justice Souter's dissent in *Morrison*, calling for a deferential, rational basis review of congressional findings as part of the "substantial effects" inquiry. However, the majority in *Morrison* rejected this standard of review, and determined that the judiciary's role was not to rubber-stamp Congress's findings, but rather to independently consider the question of whether there were indeed substantial effects on interstate commerce.

The majority in *Gregg* appears to be making an independent inquiry

into Congress's authority to enact FACE, but is in actuality incorrectly framing the issue. The activity the statute regulates is not the commercial activity of a reproductive health clinic, but is the criminal activity of protestors. This framing problem, combined with the lack of a jurisdictional element, makes FACE too similar to the VAWA examined in *Morrison* to survive constitutional scrutiny. While well intentioned, and seemingly effective legislation, FACE cannot be maintained as a proper exercise of Congress's commerce power after *Morrison*.

Nicole L. Maroulakos